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Nos. 03-1293 and 03-1294

In the Supreme Court of the United States

DAVID WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

HAYWOOD EUDON HALL, AKA DON HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), requires proof of an overt act in furtherance of the conspiracy.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Nash v. *United States*, 229 U.S. 373 (1913)	4, 5
Ratzlaf v. *United States*, 510 U.S. 135 (1994)	8
Singer v. *United States*, 323 U.S. 338 (1945)	4
United States v. *Bolden*, 325 F.3d 471 (4th Cir. 2003)	5
United States v. *Cabrales*, 524 U.S. 1 (1998)	8
United States v. *Conley*, 37 F.3d 970 (3d Cir. 1994)	7
United States v. *Emerson*, 128 F.3d 557 (7th Cir. 1997)	6, 7
United States v. *Evans*, 272 F.3d 1069 (8th Cir. 2001), cert. denied, 535 U.S. 1029 (2002)	6, 7
United States v. *Hand*, No. 95-8007, 1995 WL 743841 (10th Cir. Dec. 15, 1995) (76 F.3d 393), cert. denied, 517 U.S. 1162 (1996)	6, 7
United States v. *Hanson*, 41 F.3d 580 (10th Cir. 1994)	7
United States v. *Hildebrand*, 152 F.3d 756 (8th Cir.), cert. denied, 525 U.S. 1033 (1998)	7
United States v. *LaSpina*, 299 F.3d 165 (2d Cir. 2002)	6
United States v. *Lee*, 991 F.2d 343 (6th Cir. 1993)	7
United States v. *Navarro*, 145 F.3d 580 (3d Cir. 1998)	6, 7
United States v. *Rinke*, 778 F.2d 581 (10th Cir. 1985)	9

Cases—Continued: Page

United States v. *Rivera*, 295 F.3d 461 (5th Cir. 2002) 6
United States v. *Rodriquez*, 53 F.3d 1439 (7th Cir. 1995) 7
United States v. *Rodriquez*, 67 F.3d 1312 (7th Cir. 1995), cert. denied, 517 U.S. 1174 (1996) 9
United States v. *Ross*, 190 F.3d 446 (6th Cir.), cert. denied, 528 U.S. 1033 (1999) 6, 7
United States v. *Sassi*, 966 F.2d 283 (7th Cir.), cert. denied, 506 U.S. 991 (1992) 8
United States v. *Shabani*, 513 U.S. 10 (1994) 4, 5, 9
United States v. *Tam*, 240 F.3d 797 (9th Cir. 2001) 5
United States v. *Threadgill*, 172 F.3d 357 (5th Cir.), cert. denied, 528 U.S. 871 (1999) 6
United States v. *Virgen-Moreno*, 265 F.3d 276 (5th Cir. 2001), cert. denied, 534 U.S. 1095 (2002) 6
United States v. *Wilson*, 249 F.3d 366 (5th Cir. 2001) 6

Statutes:

Military Selective Service Act, 50 U.S.C. App. 451 *et seq.* 4-5
Sherman Act, 15 U.S.C. 1 *et seq.* 4
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 1004, 115 Stat. 392 8
18 U.S.C. 371 ..... 2, 3, 5, 7
18 U.S.C. 1341 2
18 U.S.C. 1956(a)(1)(A)(i) 2
18 U.S.C. 1956(h) 2, 3, 4, 5, 6, 7, 8
18 U.S.C. 1956(i) (Supp. I 2001) 8

Statutes—Continued: Page

18 U.S.C. 1957 2
21 U.S.C. 846 ..... 4, 5, 7, 8

Miscellaneous:

137 Cong. Rec (1991):
pp. 17,432-17,435 8
pp. 21,942-21,943 8
pp. 31,536-31,537 8
H.R. Rep. No. 28, 102d Cong., 1st Sess. Pt. 2 (1991) 8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 349 F.3d 1320.

[1] "Pet App." refers to the appendix to the petition in No. 03-1294.

JURISDICTION

The judgments of the court of appeals were entered on November 10, 2003. On January 14, 2004, Justice Kennedy extended petitioner Whitfield's time within which to file a petition for a writ of certiorari to and including March 8, 2004, and the petition was filed on March 5, 2004. On February 5, 2004, Justice Kennedy extended petitioner Hall's time within which to file a petition for a writ of certiorari to and including March 10, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners Whitfield and Hall were convicted of conspiracy to commit mail fraud, wire fraud, and interstate transportation of property taken by fraud, in violation of 18 U.S.C. 371, and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Petitioner Whitfield was also convicted of four counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and five counts of unlawful monetary transactions, in violation of 18 U.S.C. 1957. Petitioner Hall was also convicted of three counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Whitfield was sentenced to 235 months of imprisonment, and petitioner Hall was sentenced to 185 months of imprisonment, each to be followed by three years of supervised release. The court of appeals affirmed. Whitfield Pet. App. 6-18; Pet. App. 1a-11a, 12a-17a.

1. Petitioners were members of the executive board of the Greater Ministries International Church (GMIC).

Petitioner Hall was the president, pastor and an elder of GMIC; petitioner Whitfield was the treasurer, financial officer, and also an elder. Petitioners and their co-conspirators ran GMIC's "gifting" program. Under that program, investors would "gift" money to GMIC; in exchange, the investors were promised a return that doubled their contribution. Petitioners touted the program in presentations throughout the country, explaining that profits were generated through investments in gold and diamond mining, offshore commodities, and overseas banks that paid high interest rates, and that some profits were also to be used for philanthropic purposes. Pet. App. 3a; Gov't C.A. Br. 6-9.

Most of those claims were false. GMIC had no assets, and many investors received little or no return on their gifts. Moreover, only one percent of the money was donated to charity. Instead, petitioners and their co-conspirators received commissions on money that they solicited. Petitioner Hall received more than $539,000, and petitioner Whitfield received more than $678,000. Pet. App. 4a-5a; Gov't C.A. Br. 13-14.

As relevant here, petitioners were charged in count one of the indictment with conspiracy to commit mail fraud, wire fraud, and interstate transportation of goods and money taken by fraud, in violation of 18 U.S.C. 371. That count described the scheme in the "manner and means" section, including petitioners' withdrawals of large amounts of investors' funds to make payments to earlier investors and to pay commissions to the GMIC directors and other conspirators. Count one also listed 20 overt acts. Count two of the indictment charged petitioners with conspiracy to launder money, in violation of 18 U.S.C. 1956(h), and incorporated the "manner and means" section of count one. Indictment 1-11.

Petitioners requested that the district court instruct the jury that it had to find an overt act in furtherance of the money laundering conspiracy. The district court denied that request. The jury convicted petitioners of both conspiracy counts. Gov't C.A. Br. 5, 43.

2. The court of appeals affirmed. Pet. App. 1a-11a. Relying on this Court's decision in *United States* v. *Shabani*, 513 U.S. 10 (1994), it held that Section 1956(h) does not include an overt-act requirement and that the district court's instructions were therefore correct. Pet. App. 5a-7a.

ARGUMENT

Petitioners contend (Hall Pet. 12-16; Whitfield Pet. 4-10) that, in order to prove a money laundering conspiracy in violation of 18 U.S.C. 1956(h), the government must prove an overt act. That argument lacks merit and does not warrant further review by this Court.

1. In *United States* v. *Shabani*, 513 U.S. 10 (1994), this Court held that the drug conspiracy statute, 21 U.S.C. 846, does not require proof of an overt act. Section 846 provides that "[a]ny person who * * * conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the [substantive] offense." 21 U.S.C. 846 (quoted in *Shabani*, 513 U.S. at 13). In holding that the offense defined by Section 846 does not require proof of an overt act, the Court placed substantial reliance on its prior decisions in *Nash* v. *United States*, 229 U.S. 373 (1913), and *Singer* v. *United States*, 323 U.S. 338 (1945). Those cases held that no overt act is required for the conspiracy offenses under the Sherman Act, 15 U.S.C. 1 *et seq.*, and the Military Selective Service Act, 50 U.S.C. 451 *et seq.* See 513 U.S. at 13. The *Shabani* Court explained:

> *Nash* and *Singer* follow the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms. * * * We have consistently held that the common law understanding of conspiracy "does not make the doing of any act other than the act of conspiring a condition of liability."

Id. at 13-14 (quoting *Nash*, 229 U.S. at 378).

The Court also observed in *Shabani* that the general conspiracy statute, 18 U.S.C. 371, "contains an explicit requirement that a conspirator 'do any act to effect the object of the conspiracy.'" 513 U.S. at 14 (quoting 18 U.S.C. 371). "In light of this additional [overt-act] element in the general conspiracy statute," the Court stated, "Congress' silence in § 846 speaks volumes." *Ibid.*

That analysis applies equally here. The text of Section 1956(h), like that of Section 846, contains no overt-act requirement. Under the rule of construction set forth in *Shabani*, the absence of an express overt-act requirement demonstrates that Section 1956(h) incorporates the common law rule that proof of an overt act is not required. Like the court below, the Fourth and Ninth Circuits have correctly reached that conclusion. See, *e.g.*, *United States* v. *Bolden*, 325 F.3d 471, 491 (4th Cir. 2003); *United States* v. *Tam*, 240 F.3d 797, 802 (9th Cir. 2001).

2. As petitioners explain (Hall Pet. 5-9; Whitfield Pet. 6-9), opinions of the Third, Sixth, Seventh, Eighth, and Tenth Circuits state that proof of an overt act is an element of the money laundering conspiracy offense.

See *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001), cert. denied, 535 U.S. 1029 (2002); *United States* v. *Ross*, 190 F.3d 446, 450 (6th Cir.), cert. denied, 528 U.S. 1033 (1999); *United States* v. *Navarro*, 145 F.3d 580, 593 (3d Cir. 1998); *United States* v. *Emerson*, 128 F.3d 557, 561 (7th Cir. 1997); *United States* v. *Hand*, No. 95-8007, 1995 WL 743841 (10th Cir. Dec. 15, 1995) (76 F.3d 393 (Table)), cert. denied, 517 U.S. 1162 (1996).[2] For two reasons, however, those cases do not create a need for review in this case.

First, in the cases on which petitioners rely, the question whether proof of an overt act is required to establish a violation of Section 1956(h) was not at issue, and in all of those cases, the defendants' conspiracy convictions were affirmed. See *Evans*, 272 F.3d at 1098; *Ross*, 190 F.3d at 455; *Navarro*, 145 F.3d at 593; *Emerson*, 128 F.3d at 568; *Hand*, 1995 WL 743841, at *5. The statements in those opinions that proof of an overt act is a required element of a Section 1956(h) violation therefore amounted to dicta. Petitioners cite

[2] Petitioners assert (Hall Pet. 5-6; Whitfield Pet. 8) that the Fifth Circuit requires proof of an overt act. But *United States* v. *Threadgill*, 172 F.3d 357, 366 & n.5 (5th Cir.), cert. denied, 528 U.S. 871 (1999), is the only Fifth Circuit case to address the application of *Shabani* to Section 1956(h). The Fifth Circuit stated there that the question whether the money laundering conspiracy offense requires proof of an overt act is an open one. It did not reach the issue because the applicable count alleged several overt acts. Although the case that petitioners rely on, *United States* v. *Wilson*, 249 F.3d 366, 379 (5th Cir. 2001), states that an overt act is required, other cases subsequent to *Threadgill* and *Wilson* do not. See *United States* v. *Rivera*, 295 F.3d 461, 467-468 (5th Cir. 2002); *United States* v. *Virgen-Moreno*, 265 F.3d 276, 284 (5th Cir. 2001), cert. denied, 534 U.S. 1095 (2002). The Second Circuit has also noted the potential application of *Shabani* to Section 1956(h). *United States* v. *LaSpina*, 299 F.3d 165, 173 n.2 (2d Cir. 2002).

no case in which a money laundering conspiracy conviction under Section 1956(h) has been reversed for lack of proof of an overt act in furtherance of the conspiracy.

Second, while the decisions on which petitioners rely post-date *Shabani*, they do not address the effect of *Shabani* on the question whether Section 1956(h) requires proof of an overt act; indeed, they do not mention *Shabani* at all. Instead, they rely on inapplicable money laundering conspiracy cases charged pursuant to 18 U.S.C. 371 or drug conspiracy cases charged pursuant to 21 U.S.C. 846 that do not survive *Shabani*. See *Evans*, 272 F.3d at 1082 (relying on *United States* v. *Hildebrand*, 152 F.3d 756, 762 (8th Cir.), cert. denied, 525 U.S. 1033 (1998), which, in turn, relied on *United States* v. *Conley*, 37 F.3d 970, 976-977 (3d Cir. 1994), which charged a conspiracy under Section 371); *Navarro*, 145 F.3d at 593 (also relying on *Conley*); *Emerson*, 128 F.3d at 561-562 (relying on *United States* v. *Rodriguez*, 53 F.3d 1439, 1444 (7th Cir. 1995), which charged a conspiracy under Section 371); *Ross*, 190 F.3d at 450 (relying on *United States* v. *Lee*, 991 F.2d 343, 348 (6th Cir. 1993), which charged a conspiracy pursuant to 21 U.S.C. 846); *Hand*, 1995 WL 743841, at *2 (relying on *United States* v. *Hanson*, 41 F.3d 580, 582 (10th Cir. 1994), which charged a conspiracy under Section 371). Because *Shabani* makes clear that no overt act is required to establish a violation of Section 1956(h), there is every reason to believe that all the courts will reach that conclusion once the issue is squarely before them, *Shabani* is brought to their attention, and they therefore address the application of this Court's reasoning in *Shabani*.

3. Petitioner Hall seeks to distinguish *Shabani* on several grounds, but none is persuasive. Hall contends (Pet. 13-14) that the legislative history supports his

argument that Section 1956(h) requires an overt act. But when the statutory language is clear, as it is here, this Court will not resort to legislative history. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). In any event, the legislative history does not support petitioners' position. That history makes clear that Congress modeled Section 1956(h) on the drug conspiracy statute at issue in *Shabani*. 137 Cong. Rec. 31,536-31,537 (1991); 137 Cong. Rec. 21,942-21,943 (1991); 137 Cong. Rec. 17,432-17,435 (1991); H. R. Rep. No. 28, 102d Cong., 1st Sess. Pt. 2, at 49 (1991). As the Court explained in *Shabani*, "*Nash* and *Singer* give Congress a formulary: by choosing a text modeled on § 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." 513 U.S. at 14 (quoting *United States* v. *Sassi*, 966 F.2d 283, 284 (7th Cir.), cert. denied, 506 U.S. 991 (1992)). For the same reason, Congress's use of Section 846 as a model demonstrates that it intended that Section 1956(h) contain no overt-act requirement.

Petitioner Hall further argues (Pet. 14-15) that because the venue provision in the money laundering statute, 18 U.S.C. 1956(i) (Supp. I 2001), refers to overt acts, Congress assumed the existence of an overt-act requirement in Section 1956(h). That argument is unpersuasive. Section 1956(i) was added by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 1004, 115 Stat. 392. Responding to the Court's decision in *United States* v. *Cabrales*, 524 U.S. 1 (1998), Section 1956(i) clarified that a substantive money laundering prosecution may be brought in the district

where the underlying specified unlawful activity took place if the defendant participated in the movement of the criminal proceeds from that district to the district where the financial or monetary transaction occurred. The amendment also codified the existing case law that venue for attempts and conspiracies is not limited to the district where the completed offense would have occurred, but will lie in any district where an overt act was committed. That component of the Act does not presuppose that an overt act is required to establish a violation; instead, it makes prosecution possible in a venue where an overt act occurs regardless of whether proof of an overt act is required. Thus, in drug conspiracy prosecutions, venue will lie in any district where an overt act has ocurred even though the drug conspiracy statute does not require proof of an overt act. See, *e.g.*, *United States* v. *Rodriguez*, 67 F.3d 1312, 1318 (7th Cir. 1995) ("Venue under 21 U.S.C. § 846 lies in any district in which an overt act in furtherance of the conspiracy occurred."), cert. denied, 517 U.S. 1174 (1996); *United States* v. *Rinke*, 778 F.2d 581, 584-585 (10th Cir. 1985) ("when the offense charged is conspiracy [in violation of 21 U.S.C. 846], * * * venue as to prosecution of all members of [the] conspiracy lies either in the jurisdiction in which the conspiratorial agreement was formed or in any jurisdiction in which an overt act in furtherance of the conspiracy was committed by any of the conspirators") (internal quotation marks and citation omitted).

Finally, contrary to petitioner Hall's contention (Pet. 16), the rule of lenity does not apply here. "The rule of lenity * * * applies only when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *Shabani*, 513 U.S. at 17. Here, for precisely the same reasons as in

Shabani, the statute is not ambiguous. The rule of lenity therefore does not apply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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